NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. HOANG KIM VO, Defendant - Appellant.	No. 05-30498 D.C. No. CR-04-00468-01-RSM MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted May 8, 2007
Seattle, Washington

Before: BRUNETTI, McKEOWN, and W. FLETCHER, Circuit Judges.

Hoang Kim Vo appeals the 90-month sentence imposed following her guilty plea to one count of conspiracy to import ecstasy in violation of 21 U.S.C. §§ 952(a), 960(b)(3), and 963. We vacate and remand for resentencing.

First, there was no impropriety in the Government's decision not to file a

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

motion for a three-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b).[1] Vo's written plea agreement required no such motion and expressly permitted the Government to reassess Vo's acceptance of responsibility at sentencing based on her post-plea conduct. The Government's decision not to file the motion based on Vo's false statements in her proffers to the Government and in her testimony during her husband's trials was not arbitrary, made in bad faith, or based on an unconstitutional motive. *See United States v. Espinoza-Cano*, 456 F.3d 1126, 1136 (9th Cir. 2006); *United States v. Murphy*, 65 F.3d 758, 762 (9th Cir. 1995).

Second, given the district court's detailed analysis of Vo's relevant conduct, we find no clear error in the finding that Vo was more than a "minor" participant for purposes of denying a two-level reduction under U.S.S.G. § 3B1.2(b). Nor do the district court's findings contain any inherent contradictions or reveal any erroneous narrowing of the relevant class of comparable participants, unlike *United States v. Rojas-Millan*, 234 F.3d 464, 472 (9th Cir. 2000).

Third, the district court's findings that Vo testified falsely during her proffers to the government and her testimony at her husband's trials were sufficient to disqualify Vo for the safety valve under U.S.S.G. § 5C1.2(a)(5) and,

[1] Vo was sentenced under the Guidelines in effect on November 2004.

consequently, to deny a two-level reduction under § 2D1.1(b)(7).

Fourth, the district court did clearly err, however, in applying a two-level enhancement for obstruction of justice without making express findings that Vo's provision of false proffers and false testimony was willful and material. U.S.S.G. § 3C1.1; *United States v. Dunnigan*, 507 U.S. 87, 95 (1993); *United States v. Jimenez*, 300 F.3d 1166, 1170-71 (9th Cir. 2002). Moreover, despite its burden, the government's briefing fails to adequately advance a colorable argument that the error was harmless, and on this record we decline to recognize harmlessness *sua sponte*. The record is lengthy and complex, remand for resentencing will not likely result in "protracted, costly, and ultimately futile proceedings," and, most importantly, the harmlessness of the error is "reasonably debatable." *United States v. Gonzalez-Florez*, 418 F.3d 1093, 1100-01 (9th Cir. 2005); *cf. United States v. Menyweather*, 447 F.3d 625, 634 (9th Cir. 2006). We therefore leave it to the district court to reconsider the § 3C1.1 enhancement and the ultimate sentence under 18 U.S.C. § 3553.

SENTENCE VACATED AND REMANDED.